Nos. 04-1034 and 04-1384

Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN A. RAPANOS, et ux., et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE WESTERN ORGANIZATION OF RESOURCE COUNCILS, IDAHO RURAL COUNCIL, NORTHERN PLAINS RESOURCE COUNCIL, POWDER RIVER BASIN COUNCIL, DAKOTA RESOURCE COUNCIL, OREGON RURAL ACTION, WESTERN COLORADO CONGRESS, COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, CONCERNED CITIZENS FOR CLEAN WATER, AMIGOS BRAVOS, NEW MEXICO ACEQUIA ASSOCIATION, HEADWATERS, OREGON NATURAL RESOURCES COUNCIL, SNAKE VALLEY CITIZENS' ALLIANCE, NORTHERN CALIFORNIA RIVER WATCH, ARIZONA WILDLIFE FEDERATION, WALKER LAKE WORKING GROUP, WYOMING OUTDOOR COUNCIL, IOWA FARMERS UNION and MINERAL COUNTY IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED
(as presented by Petitioners)

No. 04-1034
Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

No. 04-1384
Carabell v. United States Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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INTERESTS OF AMICI CURIAE[1]

The organizations, all non-profit corporations, and one county government represented in this brief represent people who live throughout the arid West, the Pacific Coast and parts of the Midwest. Many of the organizations' members include farmers and ranchers whose economic well-being and sustenance depends upon the seasonal streams, wetlands, playa lakes, prairie potholes, vernal pools and other aquatic features that also comprise most of the aquatic habitat of the West. Many of the people represented by these entities rely upon scarce surface waters of the West and would be economically devastated without the protections afforded by the Clean Water Act, while the remainder would also have their quality of life drastically diminished by the restrictions on federal Clean Water Act jurisdiction sought by the Petitioners. Many amici members rely upon surface waters to irrigate their crops and provide drinking water for themselves and their livestock, while others are dependent upon surface waters to provide recreational opportunities that support their communities.

Western Organization of Resource Councils is a network of grassroots organizations from seven states (Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota and Wyoming) that includes 9,500 members and 46 local community groups. With most of the region

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[1] The Petitioners have filed blanket letters consenting to the participation of amici. Respondent has consented by letter, a copy of which has been filed with the Clerk, to participation by amici. No counsel for any party authored any part of this brief and no one other than amici curiae made any monetary contribution to the preparation and submission of this brief.

receiving just 10-20 inches of rain a year, landowners rely on access to clean, mountain-fed irrigation water and groundwater to prosper.

Idaho Rural Council members are family farmers, ranchers and rural Idahoans committed to preserving the economic well-being of their communities. Clean water is an absolutely critical resource to sustain present and future domestic, livestock and other agricultural uses which are especially important in the high desert areas of Southern Idaho where many members live and water is scarce.

Northern Plains Resource Council is a grassroots conservation and family agriculture group who works to protect Montana's water quality, family farms and ranches, and unique quality of life.

The Powder River Basin Resource Council works to preserve and enrich Wyoming's agricultural heritage and rural lifestyle and to conserve Wyoming's unique land, mineral, water, and clean air resources consistent with responsible use of those resources. Approximately 60% of its membership is involved in agriculture.

Dakota Resource Council is committed to preserving sustainable agriculture and natural resources in North Dakota. About 50% of DRC's members are farmers who rely on surface waters.

Oregon Rural Action works to promote social justice, agricultural and economic sustainability, and stewardship of the region's land, air and water.

Western Colorado Congress' community groups and members work together to create healthy, sustainable

communities, social and economic justice, environmental stewardship and a truly democratic society.

Community Association for Restoration of the Environment supports family farms in the State of Washington that operate in a sustainable manner, promoting both personal and economic health, stewardship of the land, and protection of air and water.

Concerned Citizens for Clean Water members in Texas and New Mexico work together to preserve and protect the Ogallala Aquifer, the major source of water for Eastern New Mexico, much of West Texas, and parts of Colorado, Oklahoma, Kansas, Nebraska, Wyoming, and South Dakota, from pollution and depletion.

Amigos Bravos works to return New Mexico's rivers and the Rio Grande watershed to drinkable quality appropriate for human contact; to see that natural flows are maintained and, where flows have been disrupted by human intervention, to seek regulation to protect and reclaim the river ecosystem by approximating natural flows; and to preserve and restore native riparian and riverine biodiversity.

The New Mexico Acequia Association works to protect and strengthen acequias through community education, community organizing and policy advocacy and whose members view water as the lifeblood of their communities because water brings them together as a community and water is essential to the continued survival of their way of life.

Headwaters (Oregon) works to rehabilitate watershed ecosystems and promote biological diversity through

promoting a just, sustainable economy, grassroots organizations, and education.

Oregon Natural Resources Council's mission is to aggressively protect and restore Oregon's wildlands, wildlife and waters as an enduring legacy.

Snake Valley Citizens' Alliance members reside in Utah and Nevada and work on issues regarding the export of groundwater resources from Snake and Spring Valleys. Depletion of groundwater through loss of surface water recharge further threatens the long-term economic basis and rural life of the valleys.

Northern California River Watch's purpose is to protect, enhance and help restore the surface and ground waters including all rivers, creeks and tributaries of Northern California.

Arizona Wildlife Federation works to educate, inspire, and assist individuals and organizations to value, conserve, enhance, manage, and protect wildlife and wildlife habitat. Support of enforcement of all state and federal conservation, game and fish laws is a priority. The AWF has promoted maximum outdoor recreation through scientific principles and the practice of multiple use of the public lands of Arizona.

Walker Lake Working Group works toward the preservation of Walker Lake, a closed-basin lake in western Nevada.

Wyoming Outdoor Council, the state's largest conservation organization, works to safeguard the state's spectacular national parks and protected areas, vast national forests and other public lands, world-renowned wildlife

and its habitat, blue-ribbon fisheries and air and water quality.

Iowa Farmers Union represents family farmers and is an affiliate of the National Farmers Union.

Mineral County businesses rely heavily upon the ability of residents and tourists to use Walker Lake for recreational purposes. Walker Lake is a closed-basin desert lake that supports a tremendous fishery.

SUMMARY OF THE ARGUMENT

The Sixth Circuit decisions should be affirmed based upon the comprehensive statutory structure of the Federal Water Pollution Control Act (commonly known as the Clean Water Act), the legislative history of the Act, and this Court's previous holdings under the Clean Water Act and its predecessor acts. While the Court need not reach the constitutional issues presented by the Petitioners, the Commerce Clause authority given to Congress to regulate pollution of the waterways in this country has been upheld by this Court based upon far less comprehensive statutes than the Clean Water Act, and thus Congress' authority to eliminate pollution under the Clean Water Act should similarly be upheld.[2]

[2] This brief is not intended to analyze in depth the plain language or legislative history of the Clean Water Act, nor the Commerce Clause tests of this Court. It is intended to highlight the comprehensive nature of the Clean Water Act and the connections of tributary streams and wetlands to the economic viability of small family farms and ranches and recreational interests unique to the West.

At the time that the Clean Water Act was passed, our Nation's waters were used for open sewage and industrial waste disposal. Congress recognized the overarching need to legislate federal protections to deal with rampant pollution. Let us not forget the setting: Lake Erie had been declared dead; the Cuyahoga River had caught fire; and waterways throughout the country were choked with pollution. Simple principles of hydrology that water and pollution flow downhill required that wetlands and inland streams could no longer be filled in or used for unregulated discharge if our Nation's waters were to be made healthy again and our economic structure was to be sustainable.

Tributary streams and adjacent wetlands act as do capillaries in the blood stream by regulating both the quality and quantity of water that reaches navigable-in-fact waters. Congress recognized that without these tributaries and wetlands, the perennial rivers would carry less, but more polluted, water, severely interfering with navigation and the channels of commerce supported by our Nation's waters. Without the capillary water systems, some perennial waters might themselves become intermittent streams, which would devastate local communities dependent on them.

Without minimum federal protections as established by the Clean Water Act, waters in all states, particularly those in the West, would be at peril of losing both water quality and quantity. Water users of the West, including family farmers and ranchers, recreationists, and outdoor enthusiasts, depend upon the important ecological and hydrological functions performed by wetlands and intermittent streams that are geographically distant from navigable-in-fact waters for their livelihood and overall

quality of life. Limiting Clean Water Act jurisdiction to navigable-in-fact waters and only immediate tributaries and adjacent wetlands would remove from regulation up to 96% of river miles from certain Western states. Such a ruling would allow the continued degradation and destruction of the Nation's waters in direct contradiction of the principles and structure of the Clean Water Act.

ARGUMENT

I. THE COMPREHENSIVE NATURE OF THE CLEAN WATER ACT AND PRIOR PRECEDENT GIVES CONGRESS THE POWER TO REGULATE INLAND WATERS TO PREVENT POLLUTION AT ITS SOURCE.

Almost 34 years ago, Congress comprehensively addressed our country's approach to controlling and, ultimately, eliminating water pollution, when it enacted wide-ranging reforms to the Federal Water Pollution Control Act. 33 U.S.C. § 1251, *et seq*. The vision of the 92nd Congress in enacting what is now known as the Clean Water Act stands as one of the legislative pinnacles in the history of this Congress and our country.

Congress clearly stated that its objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, Congress declared the ambitious goal of eliminating the discharge of pollutants into national waters by 1985. 33 U.S.C. § 1251(a)(1). It was the intent of Congress to give the Act's jurisdictional scope "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for

administrative purposes." S. Conf. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776, 3822, 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

The central issue in these two cases is the interpretation of the term "navigable waters" as it was intended by Congress. "Navigable waters" are defined in the Act as "waters of the United States . . . " 33 U.S.C. § 1362(7); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside Bayview*"). At the outset, it is important to put the present cases in the context of prior decisions of this Court. As noted in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), there was no question that Clean Water Act of 1972 was " 'the most comprehensive and far reaching water pollution bill' " that Congress ever had passed. 451 U.S. at 317-318 (citations omitted). The term "waters of the United States" has been construed broadly to cover waters that are not navigable in the traditional sense. *See Int'l Paper Co. v. Oullette*, 479 U.S. 481, 486 n. 6 (1987) (citations omitted). This broad construction is consistent with Congress' intent to get away from potential limits imposed by the term "navigable waters" that were present in prior, ineffective statutes dealing with pollution of the Nation's waters. *Riverside Bayview*, 474 U.S. at 133; *see also* Rodgers, William H. Jr., Environmental Law, § 4.12 (1st ed. 1986) ("The extension of 'navigable waters' inland is unmistakable . . . ").

Accepting this inclusive construction, this Court further found "in *Milwaukee II*, that Congress intended the 1972 Act amendments to 'establish an all-encompassing program of water pollution regulation', and that congressional 'views on the comprehensive nature of the legislation were practically universal.' An examination

of [the Act of 1972] amply supports these views. The Act applies to all point sources and virtually all bodies of water." *Int'l Paper Co.*, 479 U.S. at 492 (citations omitted); *see also Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 179 (2001) ("*SWANCC*") (Stevens, J., dissenting) ("This Court was therefore undoubtedly correct when it described the 1972 amendments as establishing 'a comprehensive program for controlling and abating water pollution.'" (Citing *Train v. City of New York*, 420 U.S. 35, 37 (1975)). The EPA has primary jurisdiction to work with the Corps to define waters of the United States and they have done so in identical language that reflects Congress' intent for a broad meaning of "waters of the United States." 33 C.F.R. § 328.3; 40 C.F.R. § 122.2. (defining waters of the United States "as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds . . . "). This Court properly deferred to the Corps' (and necessarily the EPA's) interpretation of waters of the United States in *Riverside Bayview*, 474 U.S. at 133, and should do the same here. The wetlands at issue either contribute surface flow to tributary streams, and thus are themselves tributaries, or are, at the very least, directly adjacent to tributaries covered by the Act. In keeping with the Clean Water Act's intention to take into account the hydrological and ecological connectivity of all waters, EPA has acknowledged these principles since it began interpreting the statute, and it's determination is entitled to deference.[3] The Act remains as it was intended

[3] EPA's initial Policy Statement noted: "Freshwater wetlands support the adjacent or downstream aquatic ecosystem in addition to the complex web of life that has developed within the wetland environment. The relationship of the freshwater wetland to the subsurface

(Continued on following page)

in 1972 and as it was reinforced in its amendments of 1977.[4]

The reasons for comprehensive federal action to restore the condition of waters of the United States were manifold. *See* Rodgers, Environmental Law, § 4.1. Based on decades of water pollution problems and failed legislative actions, Congress recognized in 1972 that relying on states to fund, implement and enforce effective water pollution control (and resource protection) policies, without the financial, technical, and political assistance of a strong federal program was doomed to continued failure. States' rights were carefully maintained throughout the statute, however, including requirements of consultation and partnership. *See, e.g.*, 33 U.S.C. §§ 1251(b), (g), 1252(a), and 1253. Congress created a broad but flexible federal floor of clean water safeguards, a mandatory but innovative system for protecting the Nation's waters and the public's health. States are able to be more restrictive than federal law, but must at least meet the federal minimums in order to be allowed to administer the federal requirements. *See* 33 U.S.C. § 1342(b) (state requirements to administer § 402 national pollutant discharge elimination system permit program); 33 U.S.C. § 1344(g) (state requirements to administer § 404 dredge and fill permit program); and 33 U.S.C. § 1370 (state authority to be stricter than federal law).

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environment is symbiotic, intricate and fragile." Protection of Wetlands-EPA Policy Statement, 38 Fed. Reg. 10834 (1973).

[4] The 1977 amendments as ultimately passed, and according to Senator Baker, "'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'" *Riverside Bayview*, 474 U.S. at 136-37 (citations omitted).

While Congress found the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, (along with its successor statutes) to be inadequate to protect our Nation's waters from pollution, this Court has long construed even that statute broadly. *See, e.g., United States v. Alaska*, 503 U.S. 569, 578-83 (1992) (discussing the history of the Rivers and Harbors Act and quoting Justice Holmes: "'A River is more than an amenity, it is a treasure.'" *New Jersey v. New York*, 283 U.S. 336, 342 (1931)). In fact, thirty years before the far more comprehensive Clean Water Act was passed, Justice Douglas wrote for a unanimous court that

> there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river.

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941) (construing the Flood Control Act of 1938; flood control is now covered in 33 U.S.C. § 1252(a)). Justice Douglas went on to say: "For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries." *Id.* at 525-26. No more prophetic and directly applicable statement of law could be found to apply in the cases presently before this Court. As the holdings in *Alaska* and *Atkinson* dictate, the constitutional and jurisdictional underpinnings of Congress'

ability to regulate pollution and flood control of watersheds, including wetlands and tributaries that are part of the watersheds, in the far more comprehensive Clean Water Act should not be in question.

Consistent with this Court's recognition of Congress' right to legislate to protect watersheds, the protection of the wetlands at issue in *Rapanos* and *Carabell* provide important protections to the watersheds in which they exist. These protections include not only flood control, but also pollutant filtration, nutrient storage, and plant and wildlife habitat. *See* Malcolm Newson, Hydrology and the River Environment 153 (Oxford UK: Clarendon Press 1994) ("[W]etlands both reduce the river-flood hazard and help to purify polluted water."). Congress gave the EPA the power to protect the Nation's waters, at all levels throughout the watersheds, without being bound to navigability *per se*. EPA and the Corps are bound to account for the effects on all downstream waters, all of which eventually become navigable, either as rivers or as the territorial seas. The principles of protecting upstream tributaries and wetlands that provide multiple ecological and hydrological functions have been upheld by the Courts, and reaffirmed by Congress, for decades.[8]

The cases at issue here provide an opportunity for this Court to reaffirm the scope of protection of waters intended

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[8] This Court, again unanimously, has previously recognized that "the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992) (citing 33 U.S.C. § 1288(b)(2)). Wetlands protection serves as part of the area-wide program and the agencies' implementation of this policy deserves deference by the Court.

by Congress and necessary to protect the quality of our Nation's waters. For over 60 years, this Court has upheld the constitutional ability of Congress to regulate watersheds in the context of water pollution laws. *See Atkinson*, 313 U.S. at 525. A holding to the contrary would violate the principle of *stare decisis* by overturning an extensive body of case law upholding Congress' power to regulate pollution of our Nation's waters. Furthermore, scientific studies have repeatedly confirmed the wisdom of Congress in legislating, and EPA and the Corps in administratively implementing, protections against pollution at the source.[6]

II. TRIBUTARY STREAMS AND WETLANDS ADJACENT TO OR CONNECTED WITH TRIBUTARY STREAMS ARE THE CAPILLARIES OF THE NAVIGABLE-IN-FACT ARTERIAL WATERWAYS.

While the webs of life found in aquatic systems may be complex, hydrological and ecological principles are relatively quite simple.[7] "It is clear from the ecological literature that isolated wetlands are not completely isolated. Interactions between such wetlands and other waters do occur hydrologically, through ground-water and intermittent surface-water flows, and biologically through dispersal of plants and animals." Scott G. Leibowitz,

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[6] The current Clean Water Act rules, proposed in 1975 and finalized in 1977, fully reflect Congress' intent, by extending protection to those intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce . . . " 33 C.F.R. § 328.3(a)(3).

[7] The eminent Theodor Geisel, known to all as Dr. Seuss, has captured for all ages this concept well. In *McElligot's Pool*, he shows that a fishing boy is no fool. Even a small pond with little action is likely connected downstream where fishing should gain more traction. Dr. Seuss, McElligot's Pool (Random House 1947).

Isolated Wetlands and Their Functions: An Ecological Perspective, 23 WETLANDS 517, 528 (2003). Protecting the integrity of hydrological and ecological principles is recognized and anticipated throughout the Clean Water Act, which is founded on the understanding of the need to protect our Nation's waters from pollution.

As the Court reasoned in *Riverside Bayview*, both EPA and the Corps appropriately sought to protect wetlands adjacent to waters of the United States "as integral parts of the aquatic environment . . . " *Riverside Bayview*, 474 U.S. at 134, 135-139. In this context, the Court recognized that the regulation of wetlands by the Corps was properly "'implementing congressional policy rather than embarking on a frolic of its own.'" *Id.* at 139 (quoting *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 375 (1969)).

Just as this Court recognized that the Corps deserves deference over regulation of adjacent wetlands as a class, the Corps and EPA regulations over wetlands that exist within upland areas and upland tributaries similarly deserve deference. *See Riverside Bayview*, 474 U.S. at 131 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984)); 135 n.9 ("If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand."). The agencies recognize and understand the role of surface waters, whether they be wetlands or streams, intermittent or perennial, to provide flow (and other important contributions) to navigable waters. This Court should not interfere with the agencies' scientific expertise.

The scientific literature further reinforces the agencies' regulatory system. Many perennial streams get significant contributions from ground waters that are recharged by wetlands and tributary streams. Flow contributions occur in two primary ways: through surface contribution and through groundwater recharge that ultimately feeds navigable waters downstream. *See, e.g.*, Thomas C. Winter & James W. LaBaugh, *Hydrologic Considerations in Defining Isolated Wetlands*, 23 WETLANDS 532, 533 (2003) ("Isolated lakes and wetlands (for brevity, wetlands will be used herein to represent lakes and wetlands) located in this type of setting are equivalent to shunt-bars in the flow field. That is, ground water discharges to the wetland on the up-gradient side and the wetland recharges ground water on the down-gradient side []. Wetlands in this type of hydrogeologic setting are not isolated because the ground-water flow field is a hydrologic continuum."); *Id.* at 538 ("[I]t can be said that nearly all wetlands are connected to some degree through either surface water or ground-water flow systems and that, over time, impacts in one part of a hydrologic system will be felt in other parts."); Dennis F. Whigham & Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS 541, 541-44, 547-48 (2003). In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), regulation of wetlands adjacent to tributaries is crucial.

In *Carabell*, the wetlands are not isolated either in terms of proximity or hydrological or ecological connectivity. First, the wetlands are "bordering, contiguous, or adjacent to" a tributary to a navigable water. 33 C.F.R. § 328.3(c). Second, while the record is not clear just how much the wetlands are hydrologically connected underground, this

Court has already deferred to the agencies' decision to regulate wetlands as a class. *Riverside Bayview*, 474 U.S. at 135 n.9 ("That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment" because the Corps has the discretion to issue a permit). The Corps should not be required to expend extensive resources scientifically affirming a connectivity on a case-by-case basis that is a generally accepted scientific fact. As one scientist summarizes:

> To have an impact on water quality in other ecosystems, isolated wetlands would need to be hydrologically connected to them. Several studies (e.g., McNamara et al. 1992, Winter and Rosenberry 1995, Rosenberry and Winter 1997, Podniesinski and Leopold 1998, Winter et al., 2001, Winter and LaBaugh 2003) have demonstrated that isolated wetlands have complex but direct hydrologic interactions with other wetlands and uplands. Based on the studies just cited, we assume that most isolated wetlands are, in fact, not hydrologically isolated from other waters and wetlands and, thus, have the potential to impact water quality in downstream ecosystems.

Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 542. A wetland adjacent to a tributary is by no means isolated.[8]

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[8] Wetlands were presumed by EPA in 1973 to be hydrologically connected, either through surface or underground connections. *See* note 3, *supra*. This presumption is overwhelmingly confirmed in the scientific literature. *See, e.g.*, Winter & LaBaugh, *Hydrologic Considerations in Defining Isolated Wetlands*, 23 WETLANDS at 533-34, 538 (stream or wetland may appear isolated by surface characteristics but it

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If an applicant believes that a wetland is not hydrologically connected, then the burden should be on the applicant to prove there is no hydrological connection. This would then be *one* factor, albeit not a determinative factor, for the agency to consider when reviewing an application for a permit to fill or alter an existing wetland area. *SWANCC* does not require a different result because it dealt only with the issue of the Migratory Bird Rule relied upon by the government. In that case, this Court found that the Migratory Bird Rule *by itself* was not enough to give Clean Water Act jurisdiction to the courts. *SWANCC*, 531 U.S. at 174. In the two cases presently at issue, there are numerous factors that provide Clean Water Act jurisdiction, including hydrological and ecological connectivity, adjacency to tributaries of navigable waters, flood control, pollution filtration[9], *and* migratory bird habitat. In *Rapanos*, there are uncontested surface water connections

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is not hydrologically isolated from a groundwater perspective); Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 547-48 ("Isolation is a relative term and not a very good term from an ecosystems perspective. Most isolated wetlands appear to be continuously or intermittently linked hydrologically to other ecosystems, and disturbances would result in negative effects on water quality within and external to the wetlands.").

[9] Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 543-44 ("Prairie pothole wetlands have also been shown to improve water quality and to efficiently retain nutrients (e.g., Magner et al. 1995). Many pothole wetlands have enriched nutrient conditions as a result of agricultural inputs (Neely and Baker 1989), and enrichment of N [nitrogen] and P [phosphorus] in surface waters often results in nutrient enrichment of interstitial water. Unaltered prairie pothole wetlands thus have a high potential for downstream discharge of nutrients if they are connected to other potholes by surface or groundwater discharges and drainage or ditching has the potential to significantly increase the amounts of nutrients discharged to downstream systems. Winter et al. (2001).").

between the wetlands and tributaries that eventually reach navigable-in-fact waters, *United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004), while in *Carabell* the wetlands likely have intermittent surface connections with tributaries in addition to their adjacency to the tributaries. *Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 705-06, 708 (6th Cir. 2004). Fundamentally, since the wetlands at issue are not isolated, the narrow holding in *SWANCC* is not applicable to these cases.

Perhaps determinative of its case, Carabell concedes that "[i]n general, the federal government may regulate the intrastate non-navigable tributaries of navigable waters but only insofar as it is necessary to protect the integrity of the aquatic system that constitutes the navigable waters." Carabell Brief at 19 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423-26 (1940)). Carabells' counsel also concedes that Congress had exercised proper powers by enacting the Clean Water Act because "water moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source." Carabell Brief at 24 (citing *Riverside Bayview*, 474 U.S. at 133 (quoting S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742)). These two concessions, along with deference to the agencies' regulations which are intended to protect the integrity of the aquatic system, further reinforced by the scientific literature, give this Court all it needs to affirm the Sixth Circuit opinions.

Carabell further argues that federal deference to the states over pollution is required because Congress intended to defer to state water laws. Carabell Brief at 32. The Clean Water Act does no such thing. Congress passed the statute to deal with the failure of states to be able to

address the severe pollution of interstate waters that was at least in part fed by intrastate waters. Congress provided a federal minimum under which the States could not go. *See* 33 U.S.C. § 1370 (no restrictions less stringent than federal law). As earlier noted, Congress recognized the need for federal/state cooperation, but also saw a dire need to address the problem at the federal level.[10] While Congress opted not to limit states' rights to address water *quantity* use, 33 U.S.C. § 1251(g), it did impose on the states an overarching scheme to address water *quality* issues. *See, e.g.*, 33 U.S.C. § 1312. Inclusion of wetlands and tributaries under Clean Water Act jurisdiction provides the perfect opportunity to regulate flows to maintain the integrity of the Nations' waters. *See* 33 U.S.C. § 1251(a). Addressing water pollution of tributaries and adjacent wetlands that act as the capillaries for the larger bodies of water is essential to protecting the integrity of all of the Nation's waters.

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[10] Some states, such as Idaho and New Mexico, have not created legislation protecting waters of the state from pollution and thus have not been delegated authority to administer the Clean Water Act. Many states, including Idaho, Montana, Colorado, Utah, and New Mexico also have various forms of laws in place prohibiting them from being stricter than federal laws that prevent pollution of surface waters. *See, e.g.*, State Environmental Resource Center, "Issue: 'No More Stringent' Laws," available at http://www.serconline.org/noMoreStringent.html (last visited January 6, 2006); Jeanne Christie, "Overview of State Efforts of [sic] Close the Gaps in Jurisdiction – Status and Trends in State Wetland Programs," available at http://www.aswm.org/calendar/legal/christie.pdf, slide 12 (last visited January 6, 2006). Thus, if federal jurisdiction is taken away, there will be no protections for waters of the United States in many areas of the country.

III. IN THE WEST, TRIBUTARY STREAMS, AND THE WETLANDS AND OTHER WATERS THAT HELP FEED THEM, ARE ESSENTIAL TO ECONOMIC SURVIVAL AND QUALITY OF LIFE.

In the West, the contribution of tributary streams, most often intermittent streams, and wetlands to navigable waters is obvious. Perennial surface waters are relatively rare in the West compared to the more ubiquitous waters of the East. For example, the percentage of Northeast river miles that are non-perennial are as low as 30%, while the non-perennial rivers in the interior West account for 76% of river miles. *See* Comments of the Western Water Alliance to the U.S. Environmental Protection Agency, Docket ID OW-2002-0050, April 16, 2003, Table 2, at pages 9-10 (attached hereto as Appendix 2). In Arizona, non-perennial rivers account for 96% of all river miles in the state. *Id.*

Using a different gauge, the Corps of Engineers' navigable rivers designations under Section 10 of the Rivers and Harbors Act, only 1.73% of the river miles in the entire West are navigable-in-fact. *Id.* at Table 1 (also attached hereto as Appendix 1). In New Mexico, the percent of navigable rivers is only 0.02%; in Nevada the number is only 0.10%.[11] *Id.* In eleven of the fifteen Western

[11] In the case of Mineral County, Nevada, one of the amici herein, the county government is especially interested in making sure that intermittent streams and wetlands that provide water for Walker Lake are protected. Walker Lake is a unique, closed-basin desert lake that provides substantial sport and recreational economic benefit to Mineral County businesses. It is one of only five relatively fresh, deep water desert lakes in the world supporting a substantial fishery. Pyramid Lake, also in Nevada, and three lakes in Central Asia are the others. *See* "Save Walker Lake, How Can It Be Saved?" available at http://

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states listed in the table, fewer than 1% of the rivers are navigable-in-fact. *Id.* The already arid West would be dramatically impacted by any reductions in Clean Water Act federal jurisdiction. Intermittent streams would be allowed to be used for waste disposal, thus imperiling perennial streams during times of connected flow. The loss of wetlands, already few, would lead to further depletion of tributaries[12] and loss of critical habitat for species dependent on the scarce water and plants provided by such oases.

Courts in the West, both district and appellate, have consistently upheld federal jurisdiction over non-perennial tributary waters. *See, e.g., Quivira Mining Co. v. United States Envtl. Prot. Agency*, 765 F.2d 126, 130 (10th Cir. 1985) (affirming EPA's determination that CWA permit required for discharges into surface arroyos that, during storms, channeled rainwater both directly to streams and into underground aquifers that connected with such streams); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) ("[E]ven tributaries that flow intermittently are 'waters of the United States'."). The reasoning for including intermittent tributaries within the jurisdiction of the Act is clear: "'[A]s long as the tributary would flow into the navigable body [], it is capable of

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web0.greatbasin.net/~frankly/walker.html (last visited January 6, 2006).

[12] The capacity of wetlands to temporarily store and later release water plays a critical role in supplying water to streams and rivers during dry seasons of the year. *See* Virginia Carter, *Technical Aspects of Wetlands: Wetland Hydrology, Water Quality, and Associated Functions*, United States Geological Survey Water Supply Paper 2425, available at http://water.usgs.gov/nwsum/WSP2425/hydrology.html (last visited January 10, 2006); United States EPA, *Functions and Values of Wetlands*, EPA 843-F-01-002c (Sept. 2001) available at www.epa.gov/owow/wetlands/pdf/fun_val.pdf (last visited January 10, 2006).

spreading environmental damage and is thus a 'water of the United States' under the Act.'" *Id.* at 534 (quoting *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997)).

Intermittent and ephemeral streams feed downstream perennial waters by overland flow during times when streams carry groundwater contribution, snowmelt, and other precipitation runoff. Intermittent and ephemeral streams also provide a means to filter pollutants along the way. At other times streams may disappear into the ground as ground water recharge or reemerge as whole rivers.[13] Virtually all rivers gain water from tributaries as they proceed downstream, but in areas of the West, streams or rivers dry up at times either from ground infiltration, evaporation, over appropriation, or a combination of these factors. These so-called "losing reaches" still require the same protections as streams with constant surface connections. Without them, ground water would be further depleted, thereby reducing, or in some cases eliminating, ground water used for supplying people with drinking water and irrigation water for crops and livestock. These losing streams also may again "daylight," either through springs or from being fed by other downstream tributaries. If protections are taken away from any parts of these streams they might never again see the light of day. The elimination of federal protections for such waters will ultimately lead to lower flows in the downstream

[13] The famous McKenzie River in Oregon actually disappears underground through a lava field only to reemerge some two miles downstream. *See* "A Tale of Two Rivers" available at http://www.4j.lane.edu/partners/eweb/ttr/mckenzie/cdr.html (last visited January 2, 2006).

perennial waters that rely on ground water flow to make them perennial. In other words, without these upland waters, some perennial streams might themselves become intermittent streams.

In a series of Clean Water Act enforcement cases where the plaintiff group, CARE, one of the amici on this brief, consisted of life-long residents, mostly farmers and orchardists, in the Yakima Valley in south-central Washington, industrial dairies were using natural drains and ditches[14] to dispose of manure-contaminated wastewater and to convey it to holding pits, as well as over-irrigating with manure wastewater that then ran off into the natural drains. In some cases, the drains are intermittent or ephemeral streams. They are all tributaries to the Yakima River, located two to five miles downstream from the facilities. *See Community Ass'n for Restoration of the Env't ("CARE") v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1138, 1144 (E.D. Wa. 1999) (liability phase), *aff'd*, 305 F.3d 943, 947 (9th Cir. 2002). These are just the types of waters that Petitioners and their amici argue should not receive Clean Water Act protections, even though they contain water that eventually flows into a navigable water body.

One of the CARE cases involved the then-largest dairy in the State of Washington (over 5,000 milking cows contained in pens totaling about 50 acres).[15] High fecal

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[14] Many ditches are actually natural waters that have been diverted, straightened, and ditched to promote agriculture, align with property boundaries, or drain wetlands.

[15] Large industrial dairies, with over 700 confined mature dairy cows, are called Concentrated Animal Feeding Operations, or CAFOs,

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coliform (bacteria associated with animal manure that present public health risks) readings were found in the drain that ran through the dairy's property. *See CARE v. Henry Bosma Dairy*, 2001 WL 1704240 at *10 (E.D. Wa. 2001) (penalty phase), *aff'd*, 305 F.3d 943. The drain, which at times was only inches deep, carried natural run-off and man-induced discharges that ran for miles through many people's properties to the Yakima River. *CARE*, 65 F. Supp. 2d at 1138, 1144. The drain became part of the dairy's NPDES permit and was identified in the permit as waters of the State of Washington.[16] *Id.* at 1145. Another drain next to which manure waste was placed ran about seven miles through farmland to the Yakima River. *Id.* at 1150. These drains highlight the situation that exists in much of the arid West. While the drains are not navigable themselves, they contribute significant quantities of water (and at times pollutants) to the waters downstream, in this case the Yakima River which flows into the definitively navigable-in-fact Columbia River.

These drains and ditches may be considered point sources where they are entirely within one person's property, but when they flow through multiple properties and give rise to opportunities for many individual discharges

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and are defined as point sources under the Clean Water Act. 33 U.S.C. § 1362(14).

[16] The Washington definition directly relies upon the federal definition of waters of the United States. "'Surface waters of the state' means all waters defined as 'waters of the United States' in 40 C.F.R. § 122.2 that are within the boundaries of the state of Washington. This includes lakes, rivers, ponds, streams, inland waters, wetlands, ocean bays, estuaries, sounds, and inlets.'" Wash. Admin. Code § 173-220-030(21). It is the Clean Water Act that gives the state authority to regulate the discharges as part of its federally approved program.

to contribute waste, they must be regulated as waters of the United States. Otherwise, there would be no means to eliminate the pollution that they carry to navigable waters. In either case, the Clean Water Act gives the EPA jurisdiction to regulate these sources. *See* 33 U.S.C. § 1362(14) (definition of "point source"); (7) (definition of "navigable waters"). EPA uses its discretion as to how to address the drains and ditches. The Act also has built-in exemptions from discharge limitations for limited types of activities, including "normal farming ... and ranching activities such as plowing, seeding, [etc.]. ... " 33 U.S.C. § 1344(f)(1)(A). Filling of wetlands for commercial purposes, as in the Petitioners' case facts, or for discharge of wastes into drains as exemplified in the *CARE* cases, do not fit within the narrow exceptions to permitting.

Another example involves a dairy in Idaho. In that case the dairy (over 2000 cows) was located on a plateau above two adjacent ranches. The plaintiff was the Idaho Rural Council, one of the amici herein, whose members included the ranch families. One ranch was homesteaded by the Butler family nearly a century ago and the family still ranches that property. Each ranch was dependent on springs whose source was the shallow aquifer that ran beneath the industrial dairy. The operator of the dairy had for years simply bulldozed dead animals, calf fetuses, medical waste, syringes, and manure into a ravine where one of the springs surfaced. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1176 (D. Id. 2001). The spring ran down through one rancher's property (and was used for watering free-ranging livestock) into an irrigation canal that led to a nearby creek, a downstream recreational reservoir, and then to the Snake River, a navigable water. *Id.* at 1179. As the court itself noted, "whether pollution is

introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams." *Id.* at 1180.

The Idaho case also involved wet areas on slopes known as "seeps." These seeps are located in ravines and form the beginning of the surface waters. *See* Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 544 ("Slope wetlands form where there is a discharge of ground water to the land surface (Brinson 1993). The slope of the land surface associated with this wetland class may be gentle or steep, and the sources of water are predominantly ground water (shallow or deep) and precipitation. Wetlands in this category are also called 'seeps', and they can support a wide variety of wetland plant communities (Podniesinski and Leopold 1998, Crow et al. 2000, Winter et al. 2001). Wetlands associated with seeps have been shown to be important sites for regional biodiversity because they often contain rare species (Weakley and Schafale 1994)."). Springs such as the ones described are used not only by the people who have homesteaded the areas generations ago, but also by wildlife that depend on them in these arid regions.

These small, intermittent streams are critical to the economies of the arid West. If they were to be removed from federal jurisdiction, the types of wanton pollution exemplified above would potentially go unchecked and would certainly cause further impairment to our Nation's waters, in violation of the Clean Water Act's stated goal of eliminating pollution. *See* 33 U.S.C. § 1251(a)(1). Each polluter must be responsible for the discharges he creates

in order for the point source prohibition scheme to be effective.

In New Mexico, amici New Mexico Acequia Association members depend on intermittent streams to fill their acequias, which have been used for generations to irrigate crops and water livestock.[17] Pollution discharged into these tributaries contaminates the acequias and the larger bodies of water which receive waters not used for agricultural purposes. If the tributaries are allowed to be destroyed, it would reduce the already limited quantity of surface water upon which people and wildlife depend.

Many of the members of the amici organizations on this brief are ranchers or farmers whose direct livelihood depends upon protection of the intrastate intermittent streams, adjacent wetlands and similar and unique waters that provide the arid West with its lifeblood – water. This precious water supports their economic base in addition to providing sustenance for wildlife and plants that enhance the quality of life and the interests of all amici.

Destruction or pollution of seasonal streams, small springs, wetlands and other waters inevitably leads to greater degradation and pollution of the largest and most treasured of our nation's waters, including the Great Lakes and St. Lawrence River, Chesapeake Bay, Everglades, Gulf of Mexico, Puget Sound, and the Mississippi,

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[17] An acequia is a community-based system of irrigation and water governance and also refers to the community of farmers that cooperatively maintain the ditch and share water through custom and tradition. Acequias formed the basis for settlement of New Mexico's Indo-Hispano communities between two and four hundred years ago and continue to be vital to the cultural and economic survival of the traditional communities of New Mexico.

Ohio, Illinois, Tennessee, Hudson, Missouri, Yellowstone, Snake, Columbia, Colorado and Rio Grande Rivers, to name just a few. The Clean Water Act prohibits such degrading activities and this Court should uphold the Clean Water Act and its regulatory definition of "waters of the United States."

CONCLUSION

The decisions of the Sixth Circuit in *Rapanos* and *Carabell* should be affirmed in their entirety.

Respectfully submitted,

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Table 1
Navigable River and Stream Mileage in the West

State	Total Miles	COE Sec. 10 Navigable	Notes	Percent Navigable
Arizona	90,373	280	a, b	0.31%
California	211,513	1389.9	a, b, c, d	0.66%
Colorado	107,403	39	b	0.04%
Idaho	115, 595	187	e	0.16%
Kansas	134,338	314	a, h	0.23%
Montana	176,750	1,304	a, h	0.74%
Nebraska	81,573	389	a, h	0.48%
Nevada	143,578	145	a, b	0.10%
New Mexico	110,741	20	a, i	0.02%
North Dakota	54,373	887	a, h	1.63%
Oregon	114,823	1,410	e	1.23%
South Dakota	9,937	887	h	8.93%
Utah	85,916	201	b	0.23%
Washington	70, 439	1,365	g	1.94%
Wyoming	108,767	91	a, h	0.08%
Western Total	1,616,119	24,600		1.73%

App. 1

Notes:

Total miles from 1998 EPA 305b report. http://www.epa.gov/305b/98report/appenda.pdf
Navigability determined by Corps of Engineers for purposes of Section 10 of the Rivers and Harbors Act

a. Some navigable mileage estimated.
b. Nav. Rivers: Sacramento Dist. http://www.spk.usace.mil/cespk-co/regulatory/navigable.html.
c. Nav. Rivers: San Francisco District Spreadsheet, 8/2/71
d. Nav. Rivers: LA District Pers. Comm. 2/18/03
e. Nav. Rivers: Walla Walla Dist., http://www.nww.usace.army.mil/html/offices/op/rf/Pamphlet/webpam.htm
f. Nav. Rivers: Portland District, Navigable Riverways, Oregon , October 1993
g. Nav. Rivers: Seattle District, Navigable Waters, Washington May 5, 2000
h. Nav. Rivers: Section 10 Waters of the Omaha District, undated.
i. Nav. Rivers: Albuquerque District, http://www.spa.usace.army.mil/reg/brochure4.htm

Table 2
Perennial and Nonperennial River Miles by Region

Region	Jurisdiction	Total Miles	Perennial Miles	Nonperennial Miles	Notes	Percentage Nonperennial	Regional Percentage Nonperennial
Midwest	Illinois	87,110	30,246	54,741		63%	
Midwest	Indiana	35,673	20,365	15,308	a	43%	
Midwest	Iowa	71,665	26,630	42,957		60%	
Midwest	Michigan	51,438	28,719	22,719	a	44%	
Midwest	Minnesota	91,944	32,196	59,748	a	65%	
Midwest	Missouri	51,978	21,978	30,000		58%	
Midwest	Ohio	29,113	27,825	1,288		4%	
Midwest	Wisconsin	57,698	32,010	23,777		41%	
Midwest		476,619	219,969	250,538			53%
Northeast	Connecticut	5,830	5,484	344		6%	
Northeast	Delaware	2,509	1,778	405		16%	
Northeast	Maine	31,752	23,457	8,295	a	26%	
Northeast	Massachusetts	8,229	6,808	1,421	a	17%	
Northeast	New Hampshire	10,881	8,636	2,238		21%	
Northeast	New Jersey	6,450	6,450	0	a	0%	
Northeast	New York	52,337	46,266	5,075		10%	
Northeast	Pennsylvania	83,260	39,179	44,081	a	53%	
Northeast	Rhode Island	1,392	887	505	a	36%	
Northeast	Vermont	7,099	6,958	141	a	2%	
Northeast		209,739	145,903	62,505			30%
Pacific	California	211,513	64,438	124,615		59%	
Pacific	Oregon	114,823	51,695	59,299		52%	
Pacific	Washington	70,439	39,483	30,956	a	44%	
Pacific		396,775	155,616	214,870			54%
South	Alabama	77,274	47,072	30,170		39%	
South	Arkansas	87,617	28,408	53,465		61%	
South	Florida	51,858	22,993	2,956		6%	
South	Georgia	70,150	44,056	23,906		34%	
South	Kentucky	49,105	34,152	14,953	a	30%	
South	Louisiana	66,294	32,955	20,667		31%	
South	Maryland	17,000	12,343	2,104		12%	
South	Mississippi	84,003	26,454	54,862		65%	
South	North Carolina	37,853	45,571		b	0%	
South	Oklahoma	78,778	22,386	55,413		70%	
South	South Carolina	29,898	24,115	5,783	a	19%	
South	Tennessee	61,075	53,872	7,203	a	12%	
South	Texas	191,228	40,194	144,603		76%	
South	Virginia	49,350	49,350	0		0%	
South	West Virginia	32,278	21,114	11,164		35%	
South		983,761	505,035	427,249			43%
West	Kansas	134,338	23,731	110,225		82%	
West	Nebraska	81,573	17,783	62,958		77%	
West	North Dakota	54,373	5,483	48,890		90%	
West	South Dakota	9,937	1,932	8,005		81%	
West	Arizona	90,373	3,528	86,845		96%	
West	Colorado	107,403	29,553	77,850	a	72%	
West	Idaho	115,595	54,948	52,704		46%	
West	Montana	176,750	53,221	116,608		66%	
West	Nevada	143,578	14,988	126,257		88%	
West	New Mexico	110,741	8,682	99,332		90%	
West	Utah	85,916	16,457	65,442		76%	
West	Wyoming	108,767	35,151	73,616		68%	
West		1,219,344	265,457	928,732			76%
National	**Total**	3,286,238	1,291,980	1,883,894			57%

Notes:
Total, Perennial and Nonperennial (except as noted) from 1998 EPA 305b report.
http://www.epa.gov/305b/98report/appendx.pdf

a Nonperennial mileage not reported, calculated by subtracting Perennial from Total
b Nonperennial mileage not meaningful/data inconsistency